No. 3294

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

The British Steamship "COOLGARDIE", Libellee, and H. A. THOMSON, Master and Claimant, Appellants,

vs.

WILLIAM F. JAMES,

Appellee.

BRIEF FOR APPELLANTS

ALEXANDER G. M. ROBERTSON,
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MARSHALL B. HENSHAW,
Proctors for Appellants.

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F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Appellants,

vs.

WILLIAM F. JAMES,
Appellee.

Appeal from United States District Court for the District and Territory of Hawaii.

BRIEF FOR APPELLANTS

I.

STATEMENT OF THE CASE

The appellee, Dr. William F. James, (libellant below) brought this libel against the British Steamship "Coolgardie" for injuries sustained by said appellee on the 12th day of August, 1917. On that date the appellee was acting assistant surgeon in the public health service. It was his duty to go out where the "Coolgardie" was lying, just outside

Honolulu harbor, and examine the crew, after which said vessel would either be placed in quarantine or permitted to enter.

The accident occurred at about seven o'clock in the morning after full daylight had come on; the day was bright and sunny, the water calm, the vessel lying quiet. Appellee went up over the side on a Jacob's ladder, stepped down about eighteen inches to an ordinary fibre door mat, which lay on the top of a securely lashed pile of rough lumber, the surface of which pile was level, (Apostles pp. 80, 128), and then,—the entire situation, the condition of the lumber pile, the door mat and the deck, being openly visible to, and having been observed by, him,—in jumping from the top of said lumber the two feet nine inches down to the deck of the vessel,—he sustained the injury to his right knee which he complains of. (Apostles pp. 54, 314).

Appellee, in the same capacity, had been boarding vessels at Honolulu for fifteen years prior to the accident. (Apostles p. 234).

After hearing duly had in the court below, a final decree was entered allowing libellant (the appellee here)

> "the sum of Five Thousand ($5000) Dollars as and for damages suffered by him caused by the negligence of libellee, together with costs of suit taxed in the sum of $63.25",

such negligence, in the opinion of the court, (in no way contributed to by the mat) consisting in failing to provide a safe means whereby appellee could

get from the lumber pile to the deck (Apostles pp. 316, 319).

II.

SPECIFICATIONS OF ERROR RELIED UPON

Appellants herein allege that the decree entered by the Court below is erroneous, in that it did not dismiss the libel with costs to libellee and Master and Claimant,—and rely upon the following specifications of error; (Apostles pp. 322-325 inc.):

"1. That the decree for $5,063.25 ($5000 for damages and $63.25 for costs) in favor of the libbellant was and is not warranted by the evidence, and was and is erroneous.

"2. That the Court erred in holding and deciding that the libellee was negligent in failing to have a way to get from the lumber pile to the deck provided for the use of the libellant, and thereby caused the libellant to jump and caused the libellant's injury.

"3. That the Court erred in holding and deciding that the libellee failed to use ordinary care to have a way to get aboard and on deck that was reasonably safe, provided for the libellant to use, or follow in boarding.

"4. That the Court erred in holding and deciding that no provision whatever was made for the boarding officers to get from the lumber pile to the

deck, and that the libellee was negligent in failing to make such provision.

"5. That the Court erred in holding and deciding that the exercise of ordinary care would have provided something for the boarding officers to step down upon from the lumber pile where they got off from the Jacob's ladder.

"6. That the Court erred in holding and deciding that the libellee failed to provide a reasonably safe means of access by the libellant to the vessel.

"7. That the Court erred in holding and deciding that the libellant was not negligent.

"8. That the Court erred in holding and deciding that the libellant did not assume the risks of boarding the vessel in the way and manner that he did board the same.

"9. That the Court erred in holding and deciding that negligence of the libellee was the cause of the libellant's injury.

"10. That the Court erred in not holding and deciding that the libellee was not negligent.

"11. That the Court erred in not holding and deciding that the libellant's negligence was the cause of his injury.

"12. That the Court erred in not holding and deciding that the libellant assumed all of the risks of jumping to the deck of the vessel, and that there-

fore the libellee was not liable for the libellant's injury.

"13. That the Court erred in not holding and deciding that a reasonably safe way of access to the deck of the vessel from the lumber pile was provided at the end of the lumber pile.

"14. That the Court erred in not holding and deciding that a reasonably safe way of access to the deck from the lumber pile at the end of the lumber pile was provided, that the same was open to the view of the libellant in boarding the vessel, and that by choosing to descend to the deck by jumping thereto from the lumber pile directly in front of the Jacob's ladder, the act of the libellant was the cause of the injury, and therefore the libellee was not liable for the injury.

"15. That the Court erred in not holding and deciding that the libellant's negligence at least contributed to his injury, and therefore the damages should at least have been divided.

"16. That the Court erred in not holding and deciding that the libellant's injury was due to a pure accident, and therefore the libellee was not liable.

"17. That there was and is no evidence in the record upon which to assess the damages at $5,000.00.

"18. That the Court erred in making, rendering and entering a final decree in favor of the libellant.

"19. That the Court erred in not making, rendering and entering a final decree in favor of the libellee and claimant and for their costs against the libellant."

III.

IN GENERAL

The evidence clearly shows that Dr. James (hereinafter called the appellee) was acting assistant surgeon in the public health service and visited the "Coolgardie" in his official capacity on the day of the accident. In view of the foregoing facts, it is admitted that the "Coolgardie" owed him the duty of providing a reasonably safe means of getting aboard the vessel.

But in this connection, there is the well established rule of law that

> "The law imposes on every person the duty of using ordinary care for his own protection against injury. . . Ordinary care is such care as ordinarily prudent persons would have exercised under the same or similar circumstances to avoid danger."
> 29 Cyc. 512.

The following undisputed facts of the case, we submit, should be carefully kept in mind in considering the duties of the respective parties:

The morning of the accident was clear, the weather fine, and the vessel lying quiet (Apostles pp. 64, 118, 125); the libellee swung first one leg over the rail, then the other, until he was sitting on the rail

with both feet resting on the fibre mat (Apostles pp. 53, 197), from which position he could see how high the lumber was above the deck, and the condition the deck was in (Apostles pp. 64, 198, 199); the lumber was two feet nine inches above the deck (Apostles p. 314) (three inches more than the average office desk is above the floor); he knew, he says, that the mat and the deck were wet (Apostles pp. 42, 72); yet without attempting to get down safely and easily,—as for example, by first sitting down on the lumber, allowing the legs to hang over and then standing upon the deck, or, assisting his descent by placing his hand upon the edge of the lumber (as Capt. Reeves, his witness, did) (Apostles p. 256), he decided to jump,—resulting in the accident heretofore mentioned.

The deck had been washed down that morning, and the mat had probably gotten wet at that time,—but the deck had been broomed down, that is, all the water swept off of it,—so that it was merely damp when appellee arrived on board. (Apostles pp. 68, 82, 102, 106, 125, 137, 170).

The lumber, consisting of rough-surfaced planks and boards (Apostles pp. 97, 127, 128, 138), was, according to some of the evidence, perfectly dry (Apostles pp. 128, 138, 151, 159, 170, 195),—but even if the lumber was damp or wet, it was in full view of the appellee and he saw its condition before he jumped (Apostles pp. 64, 198, 199). This lumber had been carefully piled and lashed to the bulwarks,

in such manner that it was square with the rail and the deck, and was perfectly level on top (Apostles pp. 67, 79, 96, 97, 128, 137, 138, 169, 186).

It is clear, therefore, that as appellee stepped over the rail the eighteen inches down to the mat which lay flush with the edge of the lumber pile (Apostles p. 51), he stepped upon something which was safe and sound beneath him, if rightly used. Certainly there was nothing to deceive him. It was not as though something on which he relied as being sound, was defective. Everything was simple, and open to view. There were three things only to consider,—(1) the rough even surface of the lumber pile, (2) the mat flush with the edge of the lumber pile, and (3) the distance (two feet nine inches) down to the deck. It must be apparent that if rightly used none of these agencies was, or together were, such as to cause injury, or constitute danger to anyone. It was the negligent use thereof which must in the nature of things have caused the accident, or it was a pure accident for which no one is liable.

Moreover, this vessel was a freighter, and according to the evidence of Capt. John R. Macaulay, a pilot of many years experience, it was not customary for any special means of getting from the rail down to the deck to be provided. (No attempt was made to rebut this evidence) (Apostles p. 310). And it will be noted that the Court below, holding that the failure to provide any steps on which appellee could get down from the lumber to the deck was negligence, does not cite any authorities in support thereof.

IV.

BRIEF OF THE ARGUMENT

(A) THE ACCIDENT WAS NOT CAUSED BY ANY NEGLIGENCE ON THE PART OF THE VESSEL.

The foregoing statement of undisputed facts shows that:

(1) Appellee saw every feature of the rough-surfaced, square lumber pile (with a level surface and a perpendicular side down to the deck),—and the mat lying upon, and flush with the edge of, the same,—before he jumped;

(2) When he stood upon the lumber pile and mat, he found them sound and secure,—everything was solid beneath him; nothing was other than he thought it was or could see it was; nothing deceived him;

(3) It was but two feet nine inches down to the deck,—and surely if appellee wanted to jump down, which can hardly be called a careful mode of getting down,—he cannot charge the result of such jumping to the vessel, which, having furnished the foregoing agencies, had no control over the manner in which appellee used them;

(4) The lumber pile and mat aforesaid,—if used as a reasonably prudent man, acting under the same or similar circumstances should (and probably would normally) have used them, requiring no extra-

ordinary or unusual precaution or action on his part, comprised a reasonably safe means of getting from the lumber pile to the deck. In other words, if, instead of jumping, which was unnecessary, the appellee had assisted himself with but slight use of his hands, no risk or danger could have been involved.

(5) FINALLY, and this we submit should, out of the mouth of the appellee himself and from his sworn complaint or libel even as amended, taken together with the finding of the lower Court that the mat or its slipping, if it slipped, did not constitute any negligence on the part of the vessel, (Apostles p. 314) be conclusive. The sole allegation of negligence contained in the libel is:

"that it was the duty of the owners of said steamship and of their agent and person in charge, the said captain and master, to provide a safe and reasonable means for said libellant to board said vessel; and libellant had a right to rely upon them so doing; that said libellant climbed up said Jacob's ladder but upon reaching the rail of said steamship found that he could only get upon the deck thereof by stepping upon a pile of loose and unsecured boards covered by an unfastened and unsecured door mat; relying upon the judgment of the captain and master in providing such means for boarding said vessel and thinking that the master and captain had provided a safe means, *libellant stepped upon the said door mat intending to then step upon the deck*, but by reason of the negligent and careless piling of said boards and of so unsecurely placing the door mat thereon the boards and door mat slipped when libellant stepped thereon, precipitat-

ing him heavily and violently to the iron deck; . . . " (Apostles pp. 12-13).

The only amendment appears in the opening statement of counsel for the appellee upon the beginning of the hearing, as follows:

"In connection with this I understand there is one mistake made in that the boards were lashed, and it subsequently shows such is true, and I ask that the libel be amended in that regard. The mat was placed upon the boards, and the mat, boards and deck of the ship was wet, and in stepping from the Jacob's ladder, the only means to reach the deck was on the mat, thence to the deck, and in stepping on the deck the libellant was caused to fall, the mat slipping from under his feet, and he fell to the deck, a distance of three or three and a half feet, causing the injury for which he claims damages." (Apostles p. 33.)

This is the appellee's complaint as pleaded. His charge was originally that

"loose and unsecured boards covered by an unfastened and unsecured door mat,"—and

"the negligent and careless piling of said boards and of so unsecurely placing the door mat thereon,"

and the slipping of the boards and door mat when he "stepped thereon" precipitating him to the deck and caused the injury. By the amendment aforesaid, the allegation of loose or unsecured piling of the boards and of the slipping thereof is eliminated. The evidence uncontradicted and overwhelming on this point to the contrary, of course, necessitated the amendment to save appellee from an appearance of

the ridiculous. Hence, according to his own final pleading he relies upon the door mat alone as the alleged element of negligence for a recovery.

Moreover, throughout the record of the testimony, this is the only claim of negligence. It is apparent that the height of the lumber pile from the deck never occurred to the appellee as an element of danger, until the lower Court, having held that the door mat, or its slipping if it did slip, imposed no liability upon the vessel,—then disregarding the character of negligence pleaded, found in favor of the appellant on account of the height of the lumber pile. And the appellee himself testified that it was an "easy jump" from the lumber pile to the deck, (Apostles p. 54), which can only mean that he regarded it as an ordinary, and therefore a safe, means of descent to the deck.

Moreover, contrary to his pleading that he was precipitated to the deck either by the slipping of the boards or by the slipping of the mat,—he himself testifies that he stood for an appreciable time on the mat and then jumped.

We then have this extraordinary set of facts upon which the appellee must prevail, if at all: The lower Court has found against the appellee upon the only allegation of negligence to be found in his pleadings, but has gone outside the pleadings and found in his favor upon another feature, which was not pleaded as negligence, and as to which the appellee himself has practically, and we submit completely,

admitted, and, we submit, the evidence establishes, there was no element of danger involved.

We therefore submit that no negligence on the part of the vessel is shown in the record.

(B) THE NEGLIGENCE OF THE APPELLEE IN JUMPING FROM THE LUMBER PILE TO THE DECK WAS THE PROXIMATE CAUSE OF THE INJURY, AND BARS HIS RECOVERY IN THIS SUIT.

"Proximate cause is defined to be that cause which is nearest, most immediate to, and is the direct cause of the injury complained of." *C. B. & Q. Ry. v. Martelle*, 65 Neb. 540, 91 N. W. 364, 365.

"Ordinarily that condition is usually termed the proximate cause whose share in the matter is the most conspicuous and is the most immediately preceding and proximate in the event." *Webster v. Monongahela, etc., Coke Co.*, 50 Atl. 964, 966; 201 Pa. 278.

"The proximate cause of an injury is that which naturally led to, and which might have been expected to be directly instrumental in producing the result." *Consolidated Power Co. v. Koepp*, 68 Pac. 608, 609; 64 Kan. 735.

Viewed in the light of the foregoing definitions, it seems difficult to escape the conclusion that appellee's act in jumping to the deck of the vessel was the one outstanding cause of the injury.

Being in a position where he could see everything that was before him, he decided, according to his own testimony, that " it was an easy jump" (Apostles

p. 54) and took the chance which caused the damage. Appellee's last mentioned statement must indicate that he was in the habit of making jumps whenever he deemed it necessary in boarding vessels. He could not know what an "easy jump" was except by comparison with others. Moreover, there is his further statement:

"The launch goes up as close as possible and we watch our opportunity and go from one to the other, jump from the launch to the ladder." (Apostles p. 39).

The case of *The Carl,* 18 Fed. 655, is in point. In that case libellant was one of several stevedores who was, and for several days had been, engaged in handling bottles on the lower deck of *The Carl.* There was ample room alongside one of the hatchways, in which one could pass. About 5:30 p. m. of the day of the accident, some one on the upper deck put the cover on the forehatch of the main deck, thereby darkening the place where libellant was. Brown J. at page 655 says:

"The latter (libellant) erroneously supposing that the deck hands were about to cover all the hatches, and fearing that he might be left below, turned suddenly, and forgetting the open hatch right by him, in the comparative darkness, stepped into it and fell into the hold some 15 feet below. Unfortunate as the accident was, its immediate and proximate cause seems to me to be clearly the forgetfulness and inattention—that is to say, the negligence,—of the libellant himself. *He knew perfectly* that the hatch by him was open; and even had the darkness been complete, which could not have been the case,

as the main hatch, about 50 feet distant, was wide open, there could have been no difficulty in his reaching the main hatch without danger by going along the side of the ship in the way with which he was perfectly familiar. . . . . *This negligence was therefore not merely contributory, but it was the immediate and proximate cause of the accident,* . . . . "

It was decided that the libellant could not recover.

And in the case at bar, we submit that appellee's negligent act, *jumping to the deck,* the distance to and condition of which were perfectly known to him, was "not merely contributory, but was the immediate and proximate cause of the accident." The following testimony of appellee on cross-examination is noteworthy:

"Q. And did you not place your hands on the lumber pile itself to assist yourself in stepping down to the deck?

"A. No.

"Q. Did you turn one side or the other to see whether there was any other mode of getting down to the deck that was more convenient?

"A. "No, I did not" (Apostles p. 55).

Surely it is apparent that appellee used the means of descent provided for him, in a careless and negligent manner, and was for some reason willing to take an "easy jump" the results of which he now desires to charge to the appellants.

In *The Clan Graham,* 163 Fed. 961, Libellant was a stevedore, who, in his work between decks, stepped on some dunnage which he thought was solid decking, and sustained the injury complained of. It

was so dark where he was working that a fellow-workman had lighted a candle:

Wolverton, J, at page 963 says: . . . "when the libellant stepped out in that direction, *he went with full knowledge* that he was passing over dunnage stowed upon the beams of the ship." (And it will be remembered that in the case at bar, appellee knew all the conditions before he jumped) . . . . "He must have known, also, that that particular space was then being used for the temporary stowage of dunnage, and, before walking in that direction, *he should have used greater caution.*" And it was held that the libellant could not recover.

The facts of the case at bar certainly present, as strong, if not a stronger, defense for the vessel, than the facts of the case last mentioned.

One Court, in a case not unlike the case at bar, has gone so far as to state

"While the falling through an open hatchway by a stranger, a landsman, visitor or passenger on board a vessel might not be presumptive of negligence on his part, where such accident occurs to a seaman or stevedore (or, as we submit, where an accident occurred to a boarding officer who has been fifteen years in the business), who is accustomed to hatches, their presence, necessity, uses, character and location the case is different, and unless the circumstances of the particular case are such as to rebut it, *the first presumption is of his negligence.*" (*The Gladiolus*, 21 Fed. 417, 418).

The Susquehanna, 176 Fed. 157, involved a libel by a stevedore foreman, who had charge of loading coal into the vessel. A temporary gangway or elevated platform on which wheelbarrows could be run,

had been built from the side of the vessel to a point over the hatchway. This gangway was four feet above the deck. The libellant had gone ashore about four o'clock and returned to the vessel about dark. In undertaking to do some work which he had in mind, he

"climbed up on the elevated gangway or path for wheelbarrows and jumped down upon the other side, immediately into and through the side hatch, which proved to be uncovered at the time." (p.158).

Chatfield, District Judge, at page 161 says:

"This court is unwilling to hold that the libellant exercised reasonable care in attempting to jump into and traverse a dark space such as this was, with hatchways immediately in his path, when he was in charge of the lights and was not compelled to proceed without investigation or without procuring sufficient light . . . . he did not use proper care for his own safety."

The libel was dismissed.

And in the case at bar, appellee "was not compelled to proceed" as he did. He could have refused to make quarantine examination until provided with additional means of access to the vessel, if he felt or was justified in concluding that the means provided were not reasonably safe. If the lumber had been ten or fifteen feet above the deck,—and he had nevertheless taken the chance of jumping and been injured,—could it be said that he would in such event have a claim against the vessel for his injuries?

The record does not show that at the time of the

jump to the deck he exercised care of any kind. But it does show that he considered it "an easy jump", which is of itself evidence of his mental attitude at that time towards the matter of getting down to the deck. In other words, the way of descent to the deck was safe, or, if unsafe, the appellee voluntarily assumed the risk of injury by jumping when it is apparent that the risk (consisting in the height alone) could have been obviated either by not descending at all or by descending with care commensurate to the existing conditions.

See also *The Scandinavia*, 156 Fed. 403.

The foregoing cases involve suits by stevedores, who, when on board a vessel, stand in the same relation toward the vessel, as did the appellee in the case at bar towards the "*Coolgardie*". Both are on the vessel for business reasons, neither are employees, and both are by reason of long association with vessels, their construction, etc., well aware of the care that must be shown in going about their respective duties thereon.

While the foregoing cases should be sufficient authority to require a reversal, we submit that there can be no question of that result in view of the Circuit Court of Appeals decision, (Third Circuit), in *The Euxinia*, 150 Fed. 541,—a case "on all fours" with the case at bar.

In the last mentioned case a port quarantine physician, in the course of his duty, went on board an

incoming vessel at seven o'clock in the evening after dark, while said vessel was coaling. He was met at the rail by the captain, who in escorting him to the cabin called his attention to the open hatchway where the coaling was taking place. Later the physician, in attempting to get back to where he could get off the vessel, fell through the hatchway and was killed. Gray, J. speaking for the Court, at page 544, says:

"We think there is no doubt upon this testimony that the decedent was sufficiently informed as to the position of this open hatch, and the danger to be avoided, to have put him upon his guard in relation thereto. He had been for several years a boarding officer, was familiar with the general arrangement and construction of ships' decks . . . . . We cannot find that negligence should be attributed to the ships' officers in the matter of this unfortunate accident."

And note that the court distinguishes between the duty owed by a vessel to a boarding officer and to a passenger:

"We agree that the absence of such precautions (viz: putting a barrier around an open hatch) might render liable, in case of injury to a passenger, the ship and its officers who had omitted them. But no such case is presented here." (*Id.* p. 545).

The decree below had been for $25,654.40 in favor of libellant. This decree was reversed on appeal. Moreover, a petition for a writ of certiorari in the case last mentioned was denied by the Supreme Court of the United States (205 U. S. 544; 51 Law Ed. 923).

The denial by the Supreme Court of the petition for a writ of certiorari must have been either on the ground that the decision of the Circuit Court of Appeals was obviously sound, or, on the ground that there was no diversity of reported opinion justifying review.

It would be difficult to find a case more directly in point than *The Euxinia, supra.* There we find a physician in the public health service boarding a vessel in the performance of his duty (*as here*),—we find him informed of the fact that coaling was going on, and cognizant of the existing danger from an open hatchway (*in our case any warning was unnecessary, if there was any danger, which we deny, as every part of the deck and lumber was visible in the bright light of the early morning, and according to appellee's own testimony known to him*), and we next find that he took what proved to be a fatal chance,—lifted his left foot as though to step over a corner of the coaming of the hatch (see testimony of the Captain, p. 543); with the result that he fell into the opening and was killed (*just as here the appellee, notwithstanding his knowledge of the entire situation took the chance of jumping instead of exercising care in his descent*). The Court at page 545 says:

"We think on the whole case, that the accident was one of those inevitable ones for which no one is responsible."

Is not the conclusion inevitable that appellee's

jump to the deck was, as before stated, the one predominating cause of the accident, for which he was solely responsible?

We submit that the decision in the case of *The Euxinia, supra,* requires a reversal in the case at bar.

Even in the lower Court in *The Euxinia* case (*Ward vs. Dampskibselskabet Kjoebenhaven,* 136 Fed. 502, at p. 504), in which the libellant was allowed to recover, the Court recognized the rule of law which necessarily applies in the case at bar,—that one who is cognizant of the danger confronting him (which cannot be denied to have been the fact in the case of Dr. James as the appellee was entirely aware of every condition connected with the accident before it occurred),—is held to have voluntarily assumed the risk, for the Court in its opinion, said:

"If Dr. Ward (decedent) knew and appreciated the danger surounding him, which caused the injury, then he may be held to have *voluntarily assumed the risk;* but mere notice that there was some danger, without appreciating the extent of it, will not of itself preclude a plaintiff from recovery."

(C) "THE COURT ERRED IN NOT HOLDING AND DECIDING THAT THE LIBELLANT'S NEGLIGENCE AT LEAST CONTRIBUTED TO HIS INJURY, AND THEREFORE THE DAMAGES SHOULD AT LEAST HAVE BEEN DIVIDED." (Spec. of Errors, No. 15, Apostles p. 325).

We desire to make it clear that it is our conten-

tion that the vessel is under no liability whatever. However, even under a view least favorable to the vessel, the Court below certainly erred in failing to find that appellee's electing to jump to the deck, and the actual jumping,—constituted negligence on his part, and under such a view the damages should have been divided.

The Court below says: "I assess *the* damages at Five Thousand Dollars." (Apostles p. 317). Nothing is said about a division of damages between the parties which is the rule in admiralty in a case where there is found to be concurring negligence.

See authorities hereinafter cited.

"I have found the International Navigation Co., Ltd., and the libellant, each in substantial fault, contributing to the injury. It is my duty to divide the damages."

McDonough v. International Nav. Co., 249 Fed. 248 at p. 256.

In *The Norman B. Ream*, 252 Fed. 409, 414, the Court said:

"This is not a case for the 'last clear chance' rule; moreover, that rule, in mitigation of the common law principle that makes even the slightest contributory negligence a bar to recovery, is not applicable in this country in admiralty, where contributory negligence effects only a division of liability."

See also *The Max Morris*, 137 U. S. 1; 34 L. Ed. 586; *The Truro*, 31 Fed. 158; *Olson v. Flavel*, 34 Fed. 477.

For the reasons above noted, we submit that the decree of the lower court should be reversed.

DATED at Honolulu, T. H.,
this 29th day of April, 1919.

Respectfully submitted,

(Sgd.) A. G. M. ROBERTSON,
(Sgd.) CLARENCE H. OLSON,
(Sgd.) M. B. HENSHAW,
Proctors for Appellants.

Receipt of a copy of the foregoing brief is acknowledged this 29th day of April, 1919.

THOMPSON & CATHCART,
(Sgd.) By R. A. VITOUSEK,
Proctors for Appellee.